

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NEW AGE PRODUCTS, INC.,

Plaintiff,

vs.

PROGRESSIVE INTERNATIONAL
CORPORATION,

Defendants.

No. 96 2129 J (CGA)

Deposition of

RODERICK THOMPSON

TAKEN ON: Friday, April 11, 1997

TAKEN AT: 750 B Street, Suite 2100
San Diego, California

REPORTED BY: Kathleen A. Powell
CSR No. 2778

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1 San Diego, California, Friday, April 11, 1997, 10:10 a.m.

2
3 RODERICK THOMPSON,

4 being first duly sworn, testified as follows:

5
6 EXAMINATION BY MR. BENEFIEL:

7 Q. Mr. Thompson, could you repeat your name for
8 the record.

9 A. Roderick K. Thompson.

10 Q. Are you the same Roderick Thompson that's the
11 named inventor of US patent number 5,472,790?

12 A. Right.

13 Q. How old are you?

14 A. 60.

15 Q. Good age. In response to the request, the
16 subpoena that attaches a list of documents, you've produced
17 a few papers here, a couple of patent prosecution documents
18 and you indicated before that the great bulk of the material
19 would have been left at --

20 A. Left over there, yeah.

21 Q. -- New Age?

22 And you have no samples of the Counter-Maid
23 product?

24 A. Yeah, I do -- no, no, not of the Counter-Maid.
25 No, none of those exist, as far as I know. I do have this,
26 which is our first try-out. You said bring any sample of
27 materials --

28 Q. During the development of the --

1 A. -- that were originally used. That's the --
2 probably the only one of those that's left in existence too,
3 I guess.

4 Q. I guess we can mark this as exhibit, just to
5 keep track of it here.

6 (Exhibit 1 was marked for identification.)

7 BY MR. BENEFIEL:

8 Q. That's then the sum and substance of your
9 response to this list of items here?

10 A. Uh-huh.

11 Q. Could you briefly review your education.

12 A. Elementary school; Pasadena High School,
13 Pasadena City College, Junior College, Pasadena City
14 College; college, University of California at Berkeley.

15 Q. The higher level education, could you describe
16 what courses that you took in --

17 A. Business. I was a business major, general
18 curriculum, you name it.

19 Q. Did you take any technical courses?

20 A. No.

21 Q. Have you, since your formal education, taken
22 any technical type --

23 A. No, not really. When you say technical, I did
24 take some courses in structural concrete and
25 earthquake-related concrete structural, reinforced concrete,
26 things like that back in the '60s. It was something I was
27 in. I guess you could say that was technical. That was
28 about as close as I came.

1 Q. You never had any formal training in plastics?

2 A. No.

3 Q. Where are you presently employed?

4 A. Far West Manufacturing.

5 Q. And how long have you been there?

6 A. Actually the company's been in existence since
7 1987, and I left it and came back, so actually let's say
8 since 1995 we probably started again.

9 Q. So you were originally employed at Far West in
10 1987?

11 A. It's my own company. It was originally Far
12 West Communications and then we changed it to Far West
13 Manufacturing, but the same company has been in existence
14 since 1987.

15 Q. It became inactive --

16 A. No, it didn't really become inactive. I just
17 didn't use it. I kept it open, but I didn't use it when I
18 was at New Age.

19 See, if I understand the question correctly, if
20 you're asking me when I filed my fictitious business name
21 and when I started Far West Manufacturing, it was 1987. How
22 long I've actually been an employee drawing checks this time
23 around would be 1995.

24 Q. What time in 1995?

25 A. January.

26 Q. Okay. You weren't actively doing anything -- I
27 mean the corporation was --

28 A. Inactive.

1 Q. -- inactive as far as conducting any business?

2 A. That's right.

3 Q. Prior to January of 1995, where were you
4 employed?

5 A. Ropex Industries.

6 Q. Can you spell that?

7 A. R-o-p-e-x, Industries. I'm sorry. I
8 misunderstood you again. I thought you meant prior to 1988.
9 Prior to 1995 I was at New Age.

10 Q. What years were you employed there?

11 A. New Age from 1993 to '95, two years.

12 Q. Okay. And then prior to New Age?

13 A. Prior to New Age, let's see. Briefly at
14 Schneider Plastics, about a year, I guess you'd say, from
15 1991 to '92, into '92 at Schneider Plastics.

16 Q. Okay. And prior to that?

17 A. Then prior to that it was Far West from 1987 to
18 1990, '91, whatever.

19 Q. Okay. And prior to that?

20 A. Commercial Door and Supply.

21 Q. What were the years there?

22 A. 1984 to 1987.

23 Q. And prior to that?

24 A. Ropex, R-o-p-e-x, Industries.

25 Q. Did you say R-o-p-e-x?

26 A. R-o-p-e-x.

27 Q. And that was for how long?

28 A. 1974 until 19 -- whatever I cut it off at.

1 What did I say it was? '84, yeah, about 10 years. Prior to
2 that, Hornblower and Weeks.

3 Q. What's the years on that?

4 A. 1967 to, I guess, '72 was when I left there.
5 Yeah, that's about right.

6 Q. I guess we can maybe cut it off there. You
7 were about 20 years old at that --

8 A. Well, I wish I was 20. I was a little older
9 than that.

10 Q. Yeah, that's right. Well, okay. Let's take it
11 back one more then.

12 A. Before that, I worked for a division of Martin
13 Marrietta called Master Builders. That's where I did the
14 concrete stuff, all that kind of stuff. And that was from
15 19 -- right after I got out of school. Let's see, '63 to
16 '68, yeah. Now, if I'm a month off or something on this,
17 don't send me to jail.

18 Q. Okay. The Master Builders job had to do with
19 concrete?

20 A. Concrete, yeah. That's what it was. Concrete,
21 grout, things like that.

22 Q. Construction?

23 A. Uh-huh.

24 Q. What was the nature of your job at Hornblower?

25 A. Stockbroker.

26 Q. Those are bad years, I think, weren't they?

27 A. They got a little better there. Actually '68
28 and '69 wasn't bad. '70, then it got bad.

1 Q. Ropex Industries?

2 A. That was my company and we made plastic items,
3 I guess you'd call them. Actually disposal paint tray
4 liners. We made a water box, buckets. We made plastic
5 items, general use, that type of thing.

6 Q. What was your exact duties at Ropex?

7 A. President.

8 Q. How many employees were there?

9 A. It varied from -- oh, let's say three probably.

10 Q. And what was the nature of the business as far
11 as what aspect of dealing with these plastic items?

12 A. I had an item, a brand new item, this disposal
13 paint tray liner that fits in a roller tray and I brought it
14 to market. It was a new item.

15 Q. But did your company manufacture it?

16 A. Schneider Plastics manufactured it for me. I
17 subcontracted it out to him. They did the manufacturing. I
18 did the marketing and the sales.

19 Q. Did you have any patent on the --

20 A. No.

21 Q. -- paint tray liner?

22 A. No. Missed that. I should have, but --

23 Q. Who designed the paint tray?

24 A. We designed our own. We, being George
25 Schneider at Schneider Plastics. We all sort of had a hand
26 in it, different aspects of the design.

27 Q. Do you recall what material it was made out of?

28 A. Styrene.

1 Q. There was other items also?

2 A. There was a water box, that's a long planter
3 box. You've probably seen them around for planting plants
4 in and stuff like that, about this long and about this deep
5 and made out of styrene also.

6 Q. Was that molded?

7 A. All injection -- I mean all vacuum formed.

8 Q. Vacuum formed?

9 A. Uh-huh.

10 Q. You were the hundred percent owner of Ropex?

11 A. That's right. It was a corporation.

12 Q. What was the reason that you left to go to
13 Commercial Door and Supply?

14 A. I left there -- I had an employee who embezzled
15 a lot of money from me and we eventually prosecuted him and
16 put him to jail, but he put me in a hole and the hole was so
17 deep that I ended up leaving and turning over what I had to
18 Schneider Plastics.

19 I struck a deal with George Schneider, the
20 principal of Schneider Plastics, for what I owed him from my
21 accounts and he took the accounts and we had an amiable
22 parting, of which you'll notice then we came back together
23 again in 1991. I came back to Schneider, sort of a circle
24 there.

25 Q. Okay. What was the nature of your employment
26 at Commercial Door and Supply?

27 A. It was a company that I was a 50-percent owner
28 of, partnership with another person. I was president.

11

1 Q. What was the nature of the business?

2 A. We had an item, a ready-frame, knock-down frame
3 that was new to the area and we introduced it into
4 construction in this area, this steel frame. So steel
5 framed doors and locks basically is what it was. It was a
6 new item that they hadn't seen in Southern California.

7 Q. That lasted for three years --

8 A. Uh-huh.

9 Q. -- and then you started Far West?

10 A. Uh-huh, that's correct. I moved on.

11 Q. What happened to --

12 A. My partner and I reached an agreement and I
13 sold -- actually he took the company and we made it a
14 financial agreement and he kept that company and I moved on
15 to something else.

16 Q. Schneider was not involved in this?

17 A. Not at all.

18 Q. Okay. Then Far West you formed in 1987.

19 What was the nature of that business?

20 A. That was cellular phones.

21 Q. Far West Communications?

22 A. Uh-huh.

23 Q. And that was entirely your business you already
24 stated?

25 A. That's correct.

26 Q. How big did that business grow to?

27 A. When you say how big, what do you mean?

28 Q. Number of employees.

1 A. Here again, probably three at the top end,
2 three to four employees.

3 Q. You would buy the cell phones and market then
4 and install them, et cetera?

5 A. Uh-huh.

6 Q. And that business became dormant in 1991?

7 A. Well, it actually -- when I moved down here,
8 the market on that became saturated. It was time to move on
9 around '90, '91, and I moved down here, contacted Schneider
10 Plastics and started back up with them again.

11 Q. Where were you located when you were at Far
12 West?

13 A. Newport Beach. You mean -- yeah, at Far West,
14 that first time, Newport Beach.

15 Q. What about Ropex Industries?

16 A. Newport Beach, same place.

17 Q. Same thing with Commercial Door and Supply?

18 A. Uh-huh.

19 Q. What was the nature of your employment at
20 Schneider?

21 A. Went back -- the same product that I had
22 originally, the tray liners and the water boxes, thought
23 that maybe there was a niche there that we could get back
24 into and so I approached them and said I want to take it
25 back out and see what we can do with it and that was the
26 nature of it, selling, the same thing again that I had been
27 selling with Ropex a long time before.

28 Q. Hadn't you given your accounts to Schneider

1 from Ropex in exchange for --

2 A. Uh-huh. Actually K-Mart was the one account
3 that I gave him. There might have been another one, I can't
4 recall. But the big money breadwinner there was K-Mart.

5 Q. So at Schneider in 1991 you were going to
6 attempt to sell the product more widely?

7 A. Well, in 1991, when I came down here, see,
8 Schneider Plastics used to be up in Newport and they moved
9 down here about the time I left and went into the other
10 business.

11 When I came down here, I contacted them as sort
12 of networking, just looking and went in, checked the prices
13 of the products in the stores, the tray liner, water box,
14 saw how high they were selling for, know about what it cost
15 to make them and figured there was room there to reenter the
16 marketplace again with those two items and since I knew the
17 ropes, it seemed like a pretty good idea.

18 Q. And that lasted only about a year or so?

19 A. Well, what happened was it developed into this
20 flexible cutting board thing and that was the reason that I
21 actually -- there was -- the tray liner/water box thing
22 didn't work out. She couldn't cut me a good enough price.
23 There wasn't enough room in it and along comes the flexible
24 cutting board. They're finally finding some material, so
25 that's when we started that.

26 Q. Would you say she couldn't cut you a good
27 enough price, somebody at Schneider?

28 A. Yeah, the management there at Schneider. The

14

1 price that they would make these items for me for and the
2 price I had to sell it to the store for didn't leave enough
3 room for me to really feel like it was worthwhile.

4 Q. Whose company was New Age?

5 A. We formed it.

6 Q. Schneider and yourself?

7 A. I went to them and said, "Let's form a
8 corporation, one-third --" actually it was going to a
9 partnership, one-third, one-third, one-third and myself and
10 the two principals of Schneider Plastics.

11 Q. What's their names?

12 A. It was Eloise Mick. She was Eloise Schneider
13 then, and Dave Fox.

14 Q. Dave Fox?

15 A. Uh-huh.

16 Q. What was their relationship?

17 A. They were the owners of Schneider Plastics.

18 Q. Did they have a family relationship or
19 anything?

20 A. Oh, I see what you mean. Brother-in-law,
21 sister-in-law.

22 Q. Ellie was Dave's wife's sister, something like
23 that?

24 A. Ellie was Dave's wife's sister, absolutely
25 correct, and she died.

26 Q. And it started out as a three-way split, New
27 Age was going to be owned by Ellie Schneider, Dave Fox and
28 yourself?

1 A. That's correct.

2 Q. Was the corporation founded at that time?

3 A. Let's see. I can't remember. I believe we
4 incorporated at that time. I know we each put up money and
5 stock was issued and they took care of all that, so I don't
6 know all the details. I believe we incorporated at that
7 time, though. It was a corporation and the stock was split
8 up three ways.

9 Actually -- if you really want to get technical
10 on it, they brought George back in, so now there's four
11 people and we're going to split it three ways, so I got
12 one-third and George and Eloise and Dave split two-thirds.

13 Q. George Schneider?

14 A. George Schneider.

15 Q. Was there a different building that New Age
16 occupied?

17 A. No, we leased -- rented an office space from
18 Schneider Plastics in their office, in their building.

19 Q. And what were your duties as far as New Age is
20 concerned?

21 A. President, all the duties associated with being
22 a president.

23 Q. How many employees did New Age have?

24 A. Probably one -- probably about four, I guess.

25 Q. Including yourself?

26 A. Yeah. They come and go, so we had warehouse
27 people and I don't count salesmen, commissioned salesmen as
28 employees.

1 Q. Outside salesmen?

2 A. Yeah, outside salesmen, reps and stuff like
3 that as employees.

4 Q. Basically management and just handling the
5 product?

6 A. Uh-huh.

7 Q. Was the cutting mat the sole product of New Age
8 when you were there?

9 A. In the beginning.

10 Q. Other products came in later?

11 A. Yes.

12 Q. What were those?

13 A. A micro-top, if you want to call it, floppy
14 dish cover. It was a device for microwave cooking. Another
15 plastic cover, if you want to call it that, for microwave
16 cooking.

17 Q. Were there any others?

18 A. Not that I -- there was a small mat that we
19 were working on and I can't remember if we ever really sold
20 any of those or not, to tell you the truth. I don't think
21 so.

22 Q. And then in January of '95, you left New Age
23 and reactivated Far West?

24 A. Formed Far West, that's correct.

25 Q. What was the reason for you leaving New Age?

26 A. Personality clash, philosophical differences,
27 business differences, whatever you want to call it.

28 Q. Well, who was the personality conflict with?

17

1 A. Eloise.
2 Q. She's now Ellie Mick?
3 A. Yeah, now Ellie Mick. We didn't get along.
4 Q. What were the business differences?
5 A. Marketing strategies and -- yeah, I would say
6 probably market strategy, basically how to go about
7 marketing, how to run a business. They had their ideas, I
8 had mine.
9 Q. What was your idea as far as marketing is
10 concerned?
11 A. Well, you mean what was the difference between
12 my ideas and theirs or --
13 Q. Okay.
14 A. That's sort of a -- repeat that question, would
15 you, please.
16 Q. Well, maybe you could just summarize what you
17 thought should be done marketing wise and what they thought
18 should be done marketing wise.
19 MR. SCHWARTZ: I just have -- again, I'm counsel for
20 Mr. Thompson, not counsel for the company, and as I
21 understand the underlying action is dealing with a patent?
22 MR. BENEFIEL: Correct.
23 MR. SCHWARTZ: I'm just curious as to the relevancy.
24 I see us getting further away and I want to give you the
25 leeway you need to get the questions answered you need
26 answers to, but at the same time, I want to keep, you know,
27 some direction on what we're here for.
28 So again, I don't want to stop you at this

18

1 point, but I would like to, you know, move it along.

2 MR. BENEFIEL: This is directly related to the
3 cutting mat and I'm trying to get --

4 THE WITNESS: I'll answer it this way. She was used
5 to running a company that had established products. What
6 we're doing is bringing out a new item. It's called
7 pioneering and the mode, the approach is different than when
8 you have an established product and you have to take a
9 different approach and it's slower.

10 BY MR. BENEFIEL:

11 Q. Okay. She was probably less willing to do
12 long-term groundwork type marketing activities?

13 A. Well, they were a little impatient in some
14 ways, but that wasn't really it. She didn't like me and
15 wanted me out of there and so she forced me out, I left.

16 Q. And since then, you've been with Far West
17 again, activated since January of '95 until the present
18 time?

19 A. That's right, uh-huh.

20 Q. And your company now is still marketing and
21 selling the --

22 A. That's right.

23 Q. -- cutting mat?

24 A. Uh-huh.

25 Q. Well, how many employees does Far West have at
26 this time?

27 A. Two.

28 Q. Including yourself?

1 A. Uh-huh.
2 Q. Is the cutting mat the sole product?
3 A. Uh-huh, yes, it is.
4 Q. Are you selling it under your own brand name?
5 A. Slice 'n Dice.
6 Q. Slice 'n Dice? Whereabouts in the country are
7 you selling?
8 A. All regions of the country.
9 Q. Is there a primary marketing channel that
10 you're using insofar as catalog sales or wholesaling --
11 A. No, shotgun approach.
12 Q. What are your approximate sales, annual sales?
13 A. Projected or last year or what?
14 Q. Oh, why don't you give me both of them.
15 A. 200,000 and half a million.
16 Q. Dollars?
17 A. Uh-huh.
18 Q. Projected is the 500,000?
19 A. Uh-huh.
20 Q. 200,000 last year.
21 What does the product look like, your version
22 of it?
23 A. It looks just like the one that your client
24 has, exactly.
25 Q. Insofar as the measurements?
26 A. Everything is identical. You can't tell them
27 apart.
28 Q. It's somewhat different than the Far West then?

20

1 A. From New Age you mean?
2 Q. Sorry, New Age.
3 A. It is.
4 Q. It's --
5 A. Difference in color, mine is white and theirs
6 is gray.
7 Q. It's a solid white?
8 A. Solid white, yeah.
9 Q. Are the dimensions exactly the same?
10 A. Exactly the same.
11 Q. Because they're not exactly the same with New
12 Age.
13 A. Well, then I'll go back and say I only saw
14 the -- what does he call his, Progressive's? I only saw it
15 once and it looked to be the same, eight and a half by -- 11
16 and a half by 15 is what mine measures.
17 Q. What material is yours made out of?
18 A. Polypropylene.
19 Q. Is that copolymer or --
20 A. Homopolymer.
21 Q. It's a homopolymer?
22 A. Uh-huh, I believe.
23 Q. Who is your supplier?
24 A. Company called Imperial Plastics.
25 Q. Now, do they do the manufacturing of the sheet?
26 A. They do, yeah.
27 Q. Do they get the resin from --
28 A. They get the resin and melt it down and make it

1 there.

2 Q. Is it extruded?

3 A. No. It's -- well, wait a minute. That's a
4 question I don't know the answer to, how it's made. It's
5 just rolled out in a sheet, as far as I know.

6 Q. It's delivered to Far West already cut in
7 sheets?

8 A. Uh-huh.

9 Q. And in the bag or --

10 A. No.

11 Q. Do you sell it in a bag?

12 A. Yeah, we do.

13 Q. Is that something you do at Far West?

14 A. We put it -- we put it together.

15 Q. Put it in a bag?

16 But they die cut it, Imperial?

17 A. They do.

18 Q. Do you know who their resin supplier is?

19 A. I haven't the slightest idea.

20 Q. What price do you sell yours for?

21 A. Two whom? We have a ladder scale,
22 distributors, stores, catalogs. I mean, I have about three
23 or four different prices.

24 Q. What's the retail price?

25 A. 2.99.

26 Q. Is that for one?

27 A. That's for one, right.

28 Q. Is this one of yours? Can you recognize it?

??

1 A. No. I've seen this one before. No, it's not
2 mine. The people punched a hole right through the bag and
3 the thing, and then the little residue thing is at the
4 bottom of their bag. Is that yours?

5 Q. No.

6 A. Okay. Then it could belong to Kaiser, ISI.

7 Q. Yeah, I think that's who it is.

8 I might as well put an exhibit sticker on it.

9 A. But it's the same material that everybody is
10 using now that they found it.

11 Q. Do you think it's polypropylene?

12 A. Do I? I don't know. I'm no expert on this
13 stuff. It could be polypropylene. It could be high density
14 polyethylene, which is another material that we use too for
15 making these sometimes. But I think it's polypropylene.

16 MR. BENEFIEL: Let's make this the next exhibit.

17 (Exhibit 2 was marked for identification.)

18 BY MR. BENEFIEL:

19 Q. Okay. As far as when you were at New Age, was
20 the mat that they were selling when you were last there
21 different than the one you're now selling?

22 A. Yes.

23 Q. Do you know what material theirs was made from?

24 A. The material is all the same, the color was
25 different.

26 Q. You don't know if it was a homopolymer or
27 copolymer?

28 A. It's the same as mine. If I said mine was

1 homopolymer, that's what I believe it to be. I could be
2 wrong. I'm no chemist. Their material is the same as mine,
3 so I'd have to conclude they're exactly the same materials.

4 Q. Do you have the same supplier?

5 A. I don't know where they get theirs, they're
6 secretive about that.

7 Q. Who were they getting it from when you were
8 there?

9 A. Oh, yeah, the same supplier.

10 Q. But they're now secretive?

11 A. Well, I'd have to guess they're getting it from
12 the same one, but I don't know. I don't know where they're
13 getting it.

14 Q. How many -- did I ask you this already? How
15 many employees were at New Age when you were there?

16 A. You asked me that.

17 Q. It was about four; is that right?

18 A. It varied from -- it was a low of one when we
19 started, me. I was the only one.

20 Q. Do you know what their gross sales were of the
21 mat?

22 MR. MARTIN: Object to the question as calling for
23 confidential information of New Age and I want to clarify
24 that I'm appearing here as counsel for New Age products for
25 the purpose of this deposition.

26 Mr. Thompson's activities prior to and during
27 his employment with New Age and to the extent they involve
28 attorney-client privileged communications or other

1 confidential and privileged information, we believe that
2 privilege is held by New Age and therefore it would have to
3 be New Age that would waive that privilege.

4 As to confidential information of New Age,
5 there is a protective order, but you would have to segregate
6 the information in the deposition transcript.

7 MR. BENEFIEL: That's certainly agreed to. This will
8 be a confidential answer. I don't know how you notate that
9 in your transcript.

10 MR. MARTIN: You might want to save the questions to
11 the end of the deposition, because that's what we did with
12 the deposition of your client, and it's pretty difficult for
13 the reporter to recreate a transcript in parts.

14 THE WITNESS: What was the question, the gross sales?
15 And I don't recall, to tell you the truth, what they were.
16 I could only guess.

17 BY MR. BENEFIEL:

18 Q. Do they -- well, do they sell pretty much all
19 over the country when you were there?

20 A. Uh-huh.

21 Q. They have an exclusive distributor, Norpro,
22 when you were there?

23 A. We did business with Norpro. You said
24 exclusive distributor. That I can't answer, but we did
25 business with Norpro.

26 Q. Did Norpro sell under their own name?

27 A. Private label.

28 Q. As far as you know, that wasn't any kind of an

1 exclusive arrangement?

2 A. Well, when you say exclusive, what do you mean?

3 Q. Well, for some regions of the country, they
4 were supposedly the only distributor or there was some sort
5 of exclusivity with respect to their relationship with New
6 Age?

7 A. Oh, I see.

8 MR. MARTIN: I'd object to the question as not
9 reasonably calculated to lead to admissible evidence in this
10 action.

11 MR. BENEFIEL: Well, you can answer.

12 THE WITNESS: I can't remember. I mean exclusive? I
13 just don't -- I don't know. I can't say if it was exclusive
14 or not.

15 BY MR. BENEFIEL:

16 Q. When you were at New Age, you didn't
17 necessarily involve yourself with every aspect of the
18 business then?

19 A. No.

20 Q. Where is Imperial located?

21 A. I believe they're in the state of Georgia.

22 Q. Okay. Okay, you terminated your relationship
23 with New Age and that was pursuant to or governed by a
24 letter agreement with New Age?

25 A. That's right, uh-huh.

26 (Exhibit 3 was marked for identification.)

27 BY MR. BENEFIEL:

28 Q. I show you a document that's been marked as

26

1 Exhibit 3 and ask you if you can identify it.

2 A. That's it. Oh, wait. That's the regular
3 letter that -- yeah, I recognize it.

4 Q. Is there another document that --

5 A. That's it.

6 Q. -- memorializes the terms of the split?

7 A. This is it right here.

8 (Exhibit 4 was marked for identification.)

9 BY MR. BENEFIEL:

10 Q. Let me ask you about one of these documents
11 that you produced unsigned.

12 It states Agreement of Assignment of Patent
13 Rights. It's on Schneider Plastics letterhead.

14 A. Uh-huh.

15 Q. Would you explain what that was about?

16 A. Well, exactly what you see there, when we --
17 when I first came to them and we decided to apply for a
18 patent, I agreed to assign the patent as you see here,
19 assign it to them. To them, to Schneider Plastics.

20 Since then -- afterwards we changed that when
21 we formed New Age.

22 (Exhibit 5 was marked for identification.)

23 BY MR. BENEFIEL:

24 Q. There is another document here apparently along
25 the same lines --

26 A. That was probably the upgrade.

27 Q. Exhibit 5, this was a further development of
28 what was initiated with Exhibit 4?

1 A. Right. This was made up in-house as you can
2 see. This was I think made up by Neil's office.

3 Q. The agreement, Exhibit 3, do you consider that
4 still in full force and effect?

5 A. Yes, I do.

6 Q. In paragraph two here it says that "No
7 sublicense or other authorization to any other company may
8 be granted by Mr. Thompson or New Age."

9 Does that give you a right of veto over any
10 license that New Age would enter into with respect to the
11 patent on the chopping mat?

12 MR. MARTIN: Object to the question as calling for a
13 legal conclusion.

14 BY MR. BENEFIEL:

15 Q. Do you consider that you have the right to
16 approve or disapprove such licensing arrangements?

17 A. Yes.

18 Q. Have they kept you informed as to the status of
19 license negotiations and/or infringement claims with respect
20 to the patent?

21 A. Reasonably.

22 Q. Do you feel that you are generally informed,
23 but may not be aware of every last detail of -- concerning
24 each of those situations, when you say reasonably?

25 A. That could be. I don't know everything. I
26 mean, I'm not privy to all information, so --

27 Q. Have you followed the Peter Alan situation?

28 A. Only -- only briefly.

1 Q. What is your understanding of that relationship
2 between New Age and Peter Alan?

3 A. Only that they signed an agreement of some
4 sort.

5 Q. Did you see the agreement?

6 A. No, I didn't.

7 Q. It was not submitted to you for approval?

8 A. No.

9 Q. Are you aware of the terms of it?

10 A. No.

11 Q. Do you feel that's a breach of your agreement
12 with New Age that you have not seen that?

13 MR. MARTIN: Same objection, legal conclusion as
14 called for.

15 THE WITNESS: Not necessarily a breach.

16 BY MR. BENEFIEL:

17 Q. Can you explain that?

18 A. Well, because if it's a harmless agreement, I
19 could care less. But if it comes back to bite me somehow or
20 the other, then I would feel different about it.

21 Q. You consider it at this point a harmless
22 agreement, the Peter Alan agreement?

23 A. Well, I don't know enough about it. Yes, at
24 this point, from what I know about it.

25 Q. What do you know about it?

26 A. That they allowed them to sell into certain --
27 a couple of areas that really weren't competitive with us.

28 Q. What areas are those?

29

1 A. That I don't know.

2 Q. Are they just being -- did New Age advise you
3 that it was a limited license?

4 A. No, not a license. Just that they reached an
5 agreement with these people, and allowed them to sell into
6 some areas that really weren't that important to us.

7 Q. Are you familiar with a product, a chopping mat
8 product sold by Peter Alan Designs?

9 A. No, I'm not. I've never seen one. Don't know
10 anything about it. I mean, at this point I don't.

11 Q. Do you understand if there is any royalty to be
12 paid by Peter Alan?

13 A. I don't know anything about that. Okay. I've
14 got to ask you where your restroom is.

15 (Brief recess taken.)

16 MR. BENEFIEL: I can show you what has been produced
17 by New Age, which I'm marking as -- I've got extra copies of
18 all this stuff -- that I marked as Exhibit 6 that's talking
19 about a formal agreement that's been signed.

20 (Exhibit 6 was marked for identification.)

21 BY MR. BENEFIEL:

22 Q. The letter is dated April 19, '96.

23 A. Oh, that we both -- yeah, okay. No, I've never
24 seen this.

25 MR. BENEFIEL: Also there is a press release that's
26 been produced that I'm marking as Exhibit 7.

27 (Exhibit 7 was marked for identification.)

28 MR. BENEFIEL: It describes that Peter Alan has been

30

1 given an non-exclusive license to manufacture, distribute
2 and sell a plastic cutting board according to the patent
3 identified as 5,472,790.

4 And then there is another letter I have here
5 I'll mark Exhibit 8.

6 (Exhibit 8 was marked for identification.)

7 MR. BENEFIEL: This is from Howard Isaacson to Marvin
8 Mick. And it's referring to some sort of understanding that
9 Peter Alan will not contest the validity of the patent and
10 will not divulge any information in our possession relative
11 to the patent and there is a note at the bottom.

12 THE WITNESS: I can't read it, but anyway --

13 BY MR. BENEFIEL:

14 Q. Something about all of the information on prior
15 art, including the UK, and agree not to the contest validity
16 of patent or cooperate with any third party.

17 A. I never knew about this.

18 Q. You never heard tell about any of this?

19 A. No. Well, I knew there was an agreement, but I
20 haven't seen any of this and don't really know what -- where
21 he's coming from here.

22 Q. Have you ever gotten any information as to what
23 market Peter Alan is in?

24 A. He was selling to Miles Kimball. That was
25 where he first surfaced.

26 Q. Is that a department store?

27 A. No, catalog sales.

28 Q. Oh, catalog.

1 Wouldn't that impact your business, the catalog
2 sales?

3 A. I now sell to Miles Kimball.

4 Q. You sell?

5 A. Uh-huh.

6 Q. He doesn't?

7 A. He doesn't.

8 Q. Is that the company in Wisconsin?

9 A. Yeah.

10 Q. Does New Age also sell to Miles Kimball?

11 A. I don't know.

12 Q. Did they when you were there?

13 A. I don't remember. I don't -- I don't remember.

14 Q. Was there any discussion with people at Miles
15 Kimball that you were taking the place of Peter Alan?

16 A. When?

17 Q. I mean, your product was going to be sold
18 instead of Peter Alan at any time?

19 A. Yes.

20 Q. What was the gist of the --

21 A. The gist of the discussion was that they were
22 buying a product that was infringing on a patent, pending
23 patent at that time, and that's -- that was the gist of it.

24 Q. You don't have any other relationship with New
25 Age, do you, as far as shareholder or --

26 A. No.

27 Q. -- officer, director, anything like that?

28 A. Just our joint usage of the patent.

1 Q. Are you familiar with any sort of a licensing
2 arrangement with ISI?

3 A. No.

4 Q. Are you aware that there is --

5 A. No.

6 Q. -- or you don't know if there is or isn't?

7 A. No, I'm under the impression there isn't.

8 Q. Was there an infringement situation with ISI?

9 A. There was, yes.

10 Q. What is the appearance of the ISI? Is that
11 this Exhibit 2?

12 A. That one, there is it, I believe.

13 Q. What market, if you know, is ISI active in?

14 A. He's active everywhere. When I say active
15 everywhere, his territory is the whole United States and his
16 accounts are all accounts.

17 Q. You're in direct competition with ISI?

18 A. Yes.

19 Q. I have another. This is stamped confidential.
20 It has been designated confidential. I'm not sure how this
21 would play out. Do you have an objection to me showing the
22 witness this letter?

23 MR. MARTIN: As long as it's bound into the
24 confidential exhibit portion and depending on the questions
25 you would ask about it. But if you're going to have him
26 essentially read it into the record, then why don't we put
27 it in the confidential portion of the deposition.

28 MR. BENEFIEL: No, he doesn't necessarily have to

1 read it into the record. I was just going to show it to
2 him.

3 MR. MARTIN: Okay.

4 MR. BENEFIEL: Maybe some generalities. I guess
5 we'll see how it goes here.

6 (Exhibit 9 was marked for identification.)

7 BY MR. BENEFIEL:

8 Q. Anyway, I marked that as Exhibit 9 and ask you
9 to take a look at that.

10 A. Okay.

11 Q. You're not aware of any royalty bearing license
12 with ISI between New Age and ISI?

13 A. No.

14 Q. Is it your -- would it be your understanding
15 that you would be sharing in any royalty income from the
16 patent that would be generated by New Age or not?

17 A. I -- that's something I can't tell you. I
18 don't know. I'd have to -- I'd turn this over to somebody
19 and let them look at it and tell me, because I can't answer
20 that question for you.

21 MR. BENEFIEL: Let me show you another document
22 that's been produced. I put the identification Exhibit 10
23 on it.

24 (Exhibit 10 was marked for identification.)

25 BY MR. BENEFIEL:

26 Q. That appears to be something you wrote.

27 A. Uh-huh.

28 Q. I guess you were aware of the infringement

1 situation with ISI; is that correct?

2 A. Let's see. Yeah. Uh-huh.

3 Q. They were out there in the marketplace with you
4 right now, right?

5 A. Uh-huh.

6 Q. Have you been asking what's -- what actions has
7 been taken by Far West to do something about ISI?

8 A. You mean New Age?

9 Q. Yeah, New Age, excuse me.

10 A. I spoke with ISI directly. They told me they
11 were phasing -- actually, they said they were out of this
12 business. They were phasing it out and they were out of the
13 cutting board business.

14 Q. When was that?

15 A. About a month ago.

16 Q. As far as you're concerned --

17 A. They're going out of the business, that's what
18 he told me.

19 Q. Well, let's see. This had a date on it. I'm
20 referring to Exhibit 10. It looks like it had a fax date of
21 9/13/95.

22 Did you follow up with -- do you recall this
23 thing being faxed, by the way?

24 A. This being faxed?

25 Q. Yeah.

26 A. Yeah.

27 Q. This was to Dave Fox?

28 A. Uh-huh.

1 Q. Have you been bugging him about this since that
2 day?

3 A. Not really.

4 Q. Or has it just been sliding along?

5 A. Well, yeah.

6 Q. What was the occasion of your having direct
7 discussions with ISI?

8 A. We found -- "we" being my marketing people --
9 found that they were in several accounts still active and so
10 I called them up and just asked him point blank what his
11 intentions were.

12 Q. You didn't go back to New Age or Dave Fox?

13 A. No.

14 Q. Or Marvin Mick?

15 A. Not really. He told me that they were going to
16 exhaust their inventory and when it was sold off, then they
17 were out of the business.

18 Q. Are you familiar with a product, I guess it's
19 called Do-All Plastic Cutting Board?

20 A. Who makes it?

21 Q. Teraware, Ted Reymeyer.

22 A. Yeah, just vaguely familiar with it.

23 Q. Is that still on the market, as far as you
24 know?

25 A. I have no idea. I haven't run into it or had
26 any dealings with that guy since I left New Age.

27 Q. You ran into the product though?

28 A. No.

1 MR. BENEFIEL: Here is another document that I guess,
2 we might as well put on the record. It might clarify things
3 a little bit.

4 Exhibit 11, it's a letter dated February 7th
5 from Mr. Martin to you concerning ISI and other matters.

6 (Exhibit 11 was marked for identification.)
7 BY MR. BENEFIEL:

8 Q. Do you recall getting that letter?

9 A. Yeah, uh-huh. Yeah.

10 MR. BENEFIEL: And okay. Another letter here dated
11 April 4th I'm marking as Exhibit 12.

12 (Exhibit 12 was marked for identification.)

13 BY MR. BENEFIEL:

14 Q. It's from Howard Isaacson to Marvin Mick and
15 ask you to take a look at that.

16 This letter states that the -- "As I understand
17 the agreement, we cannot discuss the contents with a third
18 party, which would prevent us from authorizing a third party
19 to produce and sell the flexible cutting board without your
20 concurrence."

21 Would you have any idea what -- why the
22 agreement would be confidential --

23 A. Which? Are they talking about the agreement
24 that they made or the agreement that I made with the New
25 Age -- okay. I answered my own question.

26 I have no idea what this is about or do I even
27 understand it. I don't understand it. I don't know where
28 they're coming from here or what they had in mind.

37

1 Q. Anyway, you don't have any information about
2 that?

3 A. Nothing, huh-uh.

4 Q. You're aware of the Kegley cutting mat?

5 A. Uh-huh. I've never seen one. I saw one in
6 your briefcase there a few minutes ago. I was curious to
7 see what it looked like. Ugly looking thing, isn't it?

8 Q. I guess it's in the eye of the beholder. I
9 might as well have you look at it, since you mentioned it.

10 A. Okay. Bacteria gets caught in here. Bacteria
11 gets caught in there. I don't like it.

12 Q. Well, I guess we're going to have to -- I don't
13 want to necessarily turn loose of my mats. I can give you
14 everything else, but I guess I'll have to keep custody of
15 these. Maybe not yours.

16 A. You don't have to give me these.

17 Q. No, I meant I don't want to leave them with the
18 court reporter either.

19 A. Oh, okay.

20 Q. You haven't actually seen one physically?

21 A. No, first time I ever saw it. I saw a picture
22 of it.

23 MR. MARTIN: We have no objection to you having
24 custody of the Kegley mat, but we would like the reporter to
25 have the sample product that would be available from Rod
26 Thompson, your exhibit what?

27 THE WITNESS: 1.

28 MR. BENEFIEL: That one, yeah.

1 THE WITNESS: That's the only one around.

2 MR. BENEFIEL: I'll leave that wherever you want to
3 leave it. We can leave it with the court reporter or with
4 Ron. I guess with Ron.

5 (Exhibit 13 was marked for identification.)

6 BY MR. BENEFIEL:

7 Q. But apparently you became aware of the Kegley
8 offering some years ago?

9 A. Uh-huh.

10 Q. Back in New Age?

11 A. Yeah.

12 Q. Do you remember when?

13 A. No.

14 Q. It was a couple years ago at least?

15 A. Yeah.

16 Q. Let's see. You left New Age in January of '95;
17 is that right?

18 A. Yeah, end of '95, so Kegley or whatever his
19 name is, he probably -- I probably saw his sometime in '93
20 or '94.

21 Q. Okay. Now, I'd like to talk about the
22 Counter-Maid product that you know doubt recall.

23 Let me mark the Counter-Maid brochure as
24 Exhibit 14.

25 (Exhibit 14 was marked for identification.)

26 BY MR. BENEFIEL:

27 Q. Do you recognize this --

28 A. Yes, uh-huh, I do.

1 Q. Do you recall when you first saw the brochure?

2 A. 10 years ago.

3 Q. That would have been in the '80s?

4 A. Uh-huh, yes.

5 Q. What were the circumstances of seeing that?

6 A. My mother gave it to me.

7 Q. Is your mother still alive?

8 A. No, she's not.

9 Q. And what did -- what did she comment when she
10 gave it to you?

11 A. Her neighbor -- she and her neighbor, I don't
12 know the involvement between the two of them as far as
13 developing it goes, but her neighbor had some of these made
14 up and they wanted to try to market it. She asked me if I'd
15 be interested and that was it. That was the relationship.

16 Q. Did you meet the neighbor?

17 A. No.

18 Q. Do you recall her name?

19 A. Marian.

20 Q. Do you recall a last name?

21 A. No, I don't.

22 Q. Where did your mother live?

23 A. Rancho Bernardo.

24 Q. What was her address, do you recall?

25 A. No, I don't. I can tell you this, it was on
26 Baja Road. It would be like 11195 Baja.

27 Q. How do you spell that?

28 A. B-a-j-a. I should know. I've written it.

40

1 B-a-j-a. That's close enough, B-a-j-a.

2 Q. Rancho --

3 A. Bernardo.

4 Q. Whereabouts is that?

5 A. It's up the freeway here.

6 Q. Escondido area?

7 A. Yeah, right.

8 Q. Do you know if she's still alive, the neighbor?

9 A. I think she's deceased. She moved a long time
10 ago from Rancho Bernardo.

11 Q. Did you ever -- well, strike that.

12 Did you ever see the product in the -- for sale
13 any place?

14 A. No.

15 Q. Did you ever have possession of a sample?

16 A. Yes.

17 Q. Where did you get that?

18 A. From my mother.

19 Q. She gave it to you at the same time that she
20 gave you the brochure?

21 A. Yeah.

22 Q. Is 1, is that a sample?

23 A. No, that's -- no.

24 Q. Did you ever speak directly to the neighbor,
25 did you say?

26 A. Yes, I did, once.

27 Q. Did she tell that you she had sold any of the
28 Counter-Maids?

1 MR. MARTIN: Object to the question as calling for
2 hearsay.

3 BY MR. BENEFIEL:

4 Q. Well, you can answer.

5 A. She was having trouble. That's why she hoped
6 that maybe somebody could help her.

7 Q. What kind of trouble was she having, did she
8 say?

9 A. Couldn't sell it.

10 MR. MARTIN: Same objection.

11 BY MR. BENEFIEL:

12 Q. She hadn't sold a single one, as far as you
13 know?

14 A. I don't know. I don't know what she had done.
15 She'd tried.

16 Q. She'd offered it for sale?

17 MR. MARTIN: Same objection.

18 THE WITNESS: That I don't know. She came to me -- I
19 don't know what she had done with it. We really never got
20 into that.

21 BY MR. BENEFIEL:

22 Q. Well, she was unsuccessful, I would -- you said
23 she tried, didn't you say?

24 A. Yeah. But she didn't -- she didn't tell me how
25 she tried or where she tried. She just wanted to know what
26 she could do to sell it. She knew I'd been in plastics
27 before.

28 Q. Did you ever hear tell that she'd attempted to

1 patent it?

2 A. No.

3 Q. Would you say that the sample you saw looked
4 like what was being pictured in the brochure here?

5 MR. MARTIN: Object to the question as being vague
6 and calling for speculation.

7 THE WITNESS: Well, I don't know if that means I'm
8 supposed to answer it or not.

9 MR. BENEFIEL: Yeah, you are.

10 MR. MARTIN: Do you understand the question?

11 THE WITNESS: The one I saw looked like what's in the
12 brochure here and it really didn't --

13 BY MR. BENEFIEL:

14 Q. The woman is -- the picture of the woman on the
15 right, I guess, is funneling apparently chopped food into a
16 bowl.

17 A. Yeah, but it was clear, for one thing, and this
18 one is white.

19 Q. How can you tell it's white?

20 A. Well, by looking at it here. It's white, isn't
21 it? She's holding it and it's white. The other one you
22 could see through, the one -- the one I saw, were her hands
23 underneath there, you would be able to see right through
24 there and see her fingers.

25 Q. Well, you know, that might be an artistic
26 license.

27 A. Uh-huh.

28 Q. Was it plastic?

1 A. Yes.

2 Q. Could you tell what kind of plastic?

3 A. No, I had no idea what kind of plastic it was
4 and nobody could figure it out.

5 Q. Did you take it to somebody else?

6 A. I took it to several people.

7 Q. Can you name any of those people?

8 A. Yeah, I can. Cadillac Plastics, that's the one
9 that stands out in my mind and there was another one I don't
10 recall what it was, but they were all up in Orange County.

11 They were plastic people and then I finally
12 ended up taking it to Schneider Plastics one day.

13 Q. Cadillac Plastic couldn't tell you what it was?

14 A. No.

15 Q. Did you ask the woman what -- Marian what the
16 stuff was?

17 A. She didn't know. She couldn't even remember
18 where she got it.

19 Q. She couldn't remember where she got it?

20 A. No, because when I talked to her, she had
21 already been fooling around with this thing for a number --
22 I don't know how many years. I can't tell you how old
23 this -- just because I saw this 10 years ago, it could be 20
24 years old, how old this thing is.

25 Q. This might have been a longstanding project
26 that Marian had?

27 A. A longstanding project. I think she probably
28 put it together and then found that she couldn't do anything

1 with it and then it just sat around, is my guess the way it
2 would be.

3 Q. So it might have been some years before when
4 she purchased the plastic and by the time you got involved,
5 she couldn't remember anymore where she got it from?

6 A. That's basically it, yeah. The -- okay, now
7 it's coming back to me. The man that she -- the person that
8 she had gotten it from was in Huntington Beach and was no
9 longer there, was no longer in business. She didn't know
10 what kind of plastic it was or where to get it.

11 Q. Huntington Beach, but she didn't, --

12 A. She just bought a roll of plastic and cut it up
13 herself. See? She didn't have anybody make them. She only
14 had a few of them.

15 Q. Did anybody ever carry out any tests on the
16 sample?

17 A. I don't know. I'm sure they must have.

18 Q. There was a statement somewhere in the patent
19 prosecution that it was believed -- this brochure was
20 believed to have been published around 1983.

21 Do you know where that information -- that was
22 a statement by your attorneys in the patent application.

23 Do you know where that 1983 date would have
24 come from?

25 A. No, I don't, unless I gave it to them and as I
26 say, it had been around for a while, so possibly it was '83.
27 I don't recall.

28 Q. Your memory might have been better then than it

1 is now about the details concerning this Exhibit 14?

2 A. True.

3 Q. Were there any tests done on the -- did I ask
4 you that already, any tests done on it, did you say?

5 A. There probably were, but I don't know the
6 results of those tests when we were trying to identify the
7 material.

8 Q. What did you do with that sample?

9 A. Left it at New Age somewhere. We cut that
10 sample up so many times to try and determine what it was,
11 that there wasn't much left of it.

12 Q. It had been attempted to be analyzed?

13 A. Uh-huh.

14 Q. By commercial --

15 A. Uh-huh.

16 Q. -- testing companies?

17 A. Uh-huh.

18 Q. But to the best of your recollection, you don't
19 remember ever getting any results?

20 A. Never did get a result. Never could find it.

21 Q. Was it similar to ISI --

22 A. No.

23 Q. In that it was white?

24 A. No, similar to the Number 1 that you have
25 there, only thinner.

26 Q. Oh, wait a minute. I'm getting confused here.

27 You said the picture showed it white, but the
28 material was transparent. Sorry.

1 A. Uh-huh.

2 Q. Well, what is Exhibit 1 then?

3 A. That was the first material that we found when
4 I was at Schneider Plastics that we felt we could use for
5 this application.

6 Q. And where was that obtained?

7 A. A company in Ohio, Witt Plastics.

8 Q. This was the first sample you got from them
9 that you thought would do the job?

10 A. That's correct.

11 Q. Do you know what the thickness is?

12 A. 10 mil.

13 Q. Do you recall what the material was?

14 A. Yeah. I think it was poly -- I think that's
15 polypropylene too. I'm not sure. I'm just guessing.

16 Q. Can you expand on the circumstances of your
17 contact with Witt Plastics a little bit?

18 A. Uh-huh --

19 MR. MARTIN: Object to the question as calling for a
20 narrative answer.

21 THE WITNESS: A what?

22 MR. MARTIN: A narrative answer, you know. I can't
23 monitor the questions and answers if counsel asks questions
24 that could be answered by a small book.

25 THE WITNESS: Okay. The question was how did I find
26 Witt Plastics?

27 BY MR. BENEFIEL:

28 Q. Yeah, better question, yeah.

1 A. It was referred to me by somebody who referred
2 them who referred them. It was a stroke of luck because
3 they're the only people in the country that could make that.

4 Q. As far as you knew?

5 A. As far as I knew then, yeah.

6 Q. What did you -- what were you looking for?

7 A. 10 mil sheet plastic.

8 Q. Any plastic?

9 A. Any plastic that was FDA approved and it would
10 fit our requirements and was 10 mil in sheet form.

11 Q. What was the FDA requirements?

12 A. Acceptable for contact with food.

13 Q. And what was your requirements at Schneider?

14 A. Don't understand that question.

15 Q. I believe you said that anything that was FDA
16 approved and would meet our requirements --

17 A. Oh, the requirements were to be flexible.

18 Q. Well, a lot of plastics are flexible, aren't
19 they, at 10 mil, but it also --

20 A. And durable, let's add durable. Requirements
21 were it has to be durable, it has to be flexible, dishwasher
22 safe. It has to meet all these criterias in order to be a
23 viable product. It can't just be a piece of plain plastic.

24 Q. What was the gist of your inquiry of Witt then
25 insofar as determining whether they could provide you with a
26 product? Do you understand that?

27 A. Yeah, it was submitting our requirements to
28 them which are basically what I just told you here and

1 submitting my requirements to them and they were able to
2 fulfill them.

3 Q. In other words, they said, "Yeah, we'll give
4 you a polypropylene 10 thousandths?

5 A. That's it.

6 Q. You didn't suggest polypropylene?

7 A. You said polypropylene. I'm not sure what the
8 material was. They said "We'll give you this material in 10
9 mil." It didn't matter to me what it was as long as it met
10 all the parameters we had.

11 Q. What was your understanding of the business of
12 Witt Plastics? What was the nature of their business
13 anyway?

14 A. Resin convertor, which is the same as a mill,
15 somebody who takes resin and melts it down, same things as
16 Imperial does.

17 Q. They take the resin and make some type of a
18 product or structure?

19 A. Yeah.

20 (Brief recess taken.)

21 BY MR. BENEFIEL:

22 Q. Did Schneider begin selling cutting mats made
23 according to Exhibit 1?

24 A. Uh-huh, yes.

25 Q. Was that shortly after you got the samples?

26 A. Yes.

27 Q. How were the initial sales created?

28 A. Advertising, trade show.

1 Q. Do you recall what trade show?

2 A. Yeah. It was the -- oh, what's that one?

3 Let's see --

4 Q. The one in Chicago?

5 A. No, no, it was up in San Francisco. No, I
6 don't. But I can just tell you this, it's -- anyway, it's
7 associated with the cooking industry, the -- I can't
8 remember the name of the show right now. It's easy to find
9 the name of the show. It's no secret.

10 Q. It's every year or every other year?

11 A. It's every year. We went that year, that's
12 where we introduced it.

13 Q. The same year you got the samples from Witt?

14 A. Yeah. No, actually the samples -- yeah, it
15 would be just about the same time. I can't really give you
16 exact months and be sure. It might be off. One's in
17 December and one's in January, that's two different years.

18 Q. What kind of advertising did you use?

19 A. Magazines, that was basically it.

20 Q. Which magazines?

21 A. Oh, there were the -- God, I don't remember
22 that either. See, I didn't handle all that. Let's get that
23 straight.

24 And here again, there are no secrets what
25 magazines they were. They were the trade magazines for the
26 cooking industry, let's put it that way.

27 Q. Okay. Was that successful?

28 A. Not really. You got a couple nibbles here and

1 there.

2 Q. Do you have any recollection of what the
3 Rockwell hardness or the flexural modulus or all that stuff
4 was of this material?

5 A. No.

6 Q. It was never tested for that?

7 A. Well, I'm sure it was tested for that. I just
8 wasn't interested or privy to or have the results of those.

9 Q. Who would?

10 A. Dave Fox. He was handling that.

11 Q. Who was handling the advertising and all that?

12 A. We had a gal there, Laura King, who handled all
13 that stuff.

14 Q. She is no longer there?

15 A. No.

16 Q. You moved on to another iteration of the
17 project?

18 A. Pardon?

19 Q. You moved on to another development of the
20 product from what's --

21 A. Upgraded it.

22 Q. Upgraded it?

23 A. Uh-huh, I guess you'd say.

24 Q. Can you describe the upgraded product?

25 A. Gray, thicker.

26 Q. Do you recall how thick?

27 A. I can only guess. I think it was around 20

28 mil.

1 Q. Do you recall what the material was?

2 A. Yeah, that was polypropylene for sure, I know
3 that.

4 Q. Who was the supplier?

5 A. That was Imperial Mills.

6 Q. That's when you went to Imperial. Do you
7 recall if it was homopolymer or copolymer?

8 A. I believe it was homopolymer.

9 Q. Do you ever remember any of them made in
10 copolymer propylene?

11 A. The only reason I'm saying that is because I
12 remember seeing the spec sheet and that word jumped out at
13 me, homopolymer. But I'm not going to sit here and say one
14 is homo and one is como, because I don't know.

15 Q. Yeah, you can't tell from looking at them.

16 A. No, way.

17 Q. How soon after the Witt product was offered did
18 you go to the improved product?

19 A. I don't know, six months. I don't want to
20 guess here so, I'll just say I don't know.

21 Q. Is -- was the product changed again after that
22 while you were at New Age?

23 A. Not to my recollection.

24 Q. Was it -- is it the same now?

25 A. I believe so.

26 Q. Well, this is another sample.

27 A. Uh-huh. You took that out of that bag, that
28 sample you have there. You took it out of that bag.

1 There is something on there. That hole, that
2 is brand new to me. That looks like what those other people
3 were doing.

4 (Exhibit 15 was marked for identification.)

5 MR. BENEFIEL: I'm putting 15 on the sample and 16 on
6 the bag.

7 MR. MARTIN: I'd like the record to reflect that the
8 bag was open.

9 MR. BENEFIEL: Yeah, the bag was open.

10 (Exhibit 16 was marked for identification.)

11 MR. BENEFIEL: Unfortunately, there's more where that
12 came from.

13 BY MR. BENEFIEL:

14 Q. Do you recognize that as a New Age product?

15 A. If you mean do I recognize this as something
16 that we handled when I was at New Age, it looks to be the
17 same, but there's a hole in this that there wasn't and it
18 could be different. I just don't know. It feels the same.
19 Something seems to be a little different about it, though.
20 So I don't know.

21 Q. Would you consider that gray?

22 A. That's opaque, is that what's called. And that
23 one is gray.

24 MR. BENEFIEL: We might as well put the sticker on
25 the unopened one, so Exhibit 17.

26 (Exhibit 17 was marked for identification.)

27 BY MR. BENEFIEL:

28 Q. To me, that seems gray, I don't know.

1 A. Yeah, this is gray.
2 Q. And this to me doesn't seem gray, Exhibit 15.
3 A. No, it's opaque.
4 Q. Did they make two versions of it when you were
5 there?

6 A. Yes, that's correct.

7 Q. An opaque and gray?

8 A. That's correct.

9 Q. Basically considered colors?

10 A. No, it was a custom project for those people.

11 Q. Norpro?

12 A. Uh-huh.

13 Q. They didn't like the gray?

14 A. They wanted to distance themselves from the
15 gray.

16 Q. Oh, I see. Was there colors also?

17 A. No.

18 Q. That happened when you were at New Age?

19 A. Yes, it did.

20 Q. Did we mark the patent? I don't think we did.
21 Do you recall the thickness of these, Exhibit
22 15 and 16?

23 A. You asked me about this one already and I told
24 you I thought it was 20 and on this one, when I was there, I
25 believe it was 18 mil. I think that one is --

26 Q. Exhibit -- the Norpro one is --

27 A. Yeah.

28 Q. Is 18 and the other one is 20. Did I get that

54

1 one right?

2 A. Approximately.

3 Q. Norpro's was made slightly thinner?

4 A. Correct.

5 Q. Did you know personally that polypropylene was
6 used for or was FDA approved?

7 A. Did I know personally?

8 Q. Yeah. Yes. I hate the way that shows up in
9 the record.

10 A. What's that?

11 Q. Never mind.

12 A. Yes, I guess the answer to that is yes. I saw
13 the -- yeah. I believed it to be FDA approved.

14 MR. BENEFIEL: Okay. We'll put exhibit sticker 18 on
15 the patent copy here.

16 (Exhibit 18 was marked for identification.)

17 BY MR. BENEFIEL:

18 Q. Do you recall that there was a first patent
19 application filed on the cutting mat and then there was a
20 refile of it?

21 A. Yeah, I think I remember something like that.

22 Q. There is a reference down there, continuation
23 in part of Serial Number 994,665, December 22nd, 1992 and
24 then there is like Item 21, application number 259,006, so
25 there was two applications apparently. Do you recall that?

26 A. I don't even see where you're at here, but to
27 answer your question, I know there was a lot of ongoing --
28 ongoing correspondence, things like that that Neil Martin's

cc

1 office handled and I really didn't -- all I did was call him
2 up and ask him how we're doing. I didn't really keep track
3 of it that much. There were a lot of things that were
4 filed, I know that. Tons of things.

5 Q. Do you recall that the range of thickness that
6 was described in the first application was up to 30
7 thousandths and then it was increased to 60 thousandths in
8 the second application?

9 A. I think we discussed that at one point. I
10 don't recall all the details about it, though. As I say, I
11 didn't really handle that part of it.

12 Q. Let me back up a little here. There wasn't a
13 lot of development as far as trial and error is concerned by
14 yourself at New Age to come up with a successful plastic?

15 In other words, there was not a large number of
16 candidates that were looked at and rejected by the results
17 of tests at New Age; is that clear to you?

18 A. Yeah, but the way you phrased that, you said
19 there was not a bunch of them. The answer is we looked for
20 a long time to find the right product, the right plastic and
21 there were a number of failures, if you want to call it,
22 things that didn't work.

23 Q. So there was samples that were obtained and
24 looked at --

25 A. We didn't even really obtain them. The people
26 we contacted would just say "No, ours won't work for that,"
27 or "We can't fit those requirements. We can't produce it to
28 you."

1 We didn't have everybody send us a sample every
2 time we called them and ask them if they could make what we
3 were looking for.

4 Understand I didn't do all the bird dogging on
5 this. I did in the beginning and turned it over to Dave Fox
6 at Schneider Plastics and he did most of the calling around
7 and looked at the samples and things like that.

8 Q. Was there any formal testing --

9 A. I'm sure, yeah.

10 Q. -- at the shop by New Age?

11 A. Everything was tested, but see you're asking me
12 questions I can't really give you -- the answer is yes,
13 there was testing, but I wasn't part of the testing.

14 Q. What was the nature of the testing as far as --

15 A. Everything to the hardness, to the modulus to
16 the flexibility. All the characteristics of the plastic.

17 Q. It was tested at Schneider?

18 A. No, I don't believe they had the capabilities
19 to test them there. I don't know what capabilities they
20 had. They have a pretty nice lab there, but I don't believe
21 they had the capabilities to totally test it. I believe
22 they had it done someplace. I just don't know that.

23 Q. But that's not something you were directly
24 involved in?

25 A. No.

26 Q. Schneider has a lab?

27 A. Had a -- they had a -- a -- well, when you say
28 lab, I wouldn't call it a lab, but it was a room where they

1 did all their development and they had a lot of machines in
2 there that were --

3 Q. What kind of machines?

4 A. Well, I couldn't tell you that either. Well, I
5 mean, I could. They were computer -- a CAD for drawing and
6 developing these -- see, they made a lot of custom vacuum
7 forming stuff, so he had a pretty thorough shop in there,
8 but I couldn't tell you what all the machines were, no way.

9 Q. Well, do you recall any change in thinking
10 based on product evaluation that the limit, upper limit of
11 the patent should be changed from 30 thousandths to 60
12 thousandths?

13 A. Do I recall any reason for it to be changed?

14 Q. Yeah, technically, any reason as an out-growth
15 of your development --

16 A. Well, yeah, as we developed it along,
17 apparently -- apparently that was the working range.

18 Q. In the second -- at a later date. The earlier
19 thinking was that 30 thousandths was the maximum, do you
20 recall that?

21 A. No, I don't recall how that came about.

22 Q. Do you recall if the Kegley, your understanding
23 of the Kegley mat was that it was thicker than 30
24 thousandths?

25 A. No, I don't know anything about their mat
26 except what I just saw. If you mean did we change it
27 because I -- somebody saw the Kegley mat and said "Let's go
28 higher," that didn't happen at all.

1 Q. You don't think that --

2 A. No, not at all. Never even saw their mat. The
3 changes in the thickness were not made because we saw
4 somebody else's product and said "Let's change it," because
5 there wasn't really much competition at that time. The
6 changes were made in our own development and improvement.

7 Q. The patent lists a number of properties of the
8 plastic that is specified as a polypropylene obtained or
9 manufactured by Rexene Resins. Do you recall --

10 A. Now I do, yeah, Rexene. They supplied the
11 resin.

12 Q. That would have gone to Imperial at that time?

13 A. That went to Witt, as I recall.

14 Q. To Witt?

15 A. As I recall.

16 Q. These values, as far as you recollect, did they
17 come from Rexene?

18 A. Oh, the ones in the patent?

19 Q. Yeah.

20 A. I don't know where they came from. I really
21 don't. See, I didn't write all this stuff. Understand,
22 this the patent was done by Neil's office. I didn't write
23 any of this stuff at all because I don't even understand it.

24 Q. What about the language in the patent about
25 five ounces of being supported at 10 inches, so the plastic
26 should be strong enough that when you flexed it, it should
27 support five ounces.

28 Do you recall any kind of testing done to

1 establish that five ounces?

2 A. Yeah, just about what you're doing now and
3 guesstimating as to what we had to have to make it work, how
4 it had to -- this one, the original one was way too thin and
5 this one, to support -- that's more than five ounces.

6 Q. Probably should use something unbreakable.

7 A. Those were the guesstimates or whatever.

8 Q. When you say the original was way too thin,
9 which one was that?

10 A. The original one that my mother had.

11 Q. The Counter-Maid?

12 A. Yeah, it was way too thin to support anything.
13 It was like a piece of wax paper.

14 Q. Notwithstanding that the Exhibit 14 seems to
15 show that kind of a --

16 A. What you see in that exhibit is holding it like
17 this and having it go down, we're talking about supporting
18 it out here. Supporting it is one thing.

19 I could take this and you could pour something
20 on it and it will funnel it right now, but you try to
21 support it out there, it's not going to do.

22 Q. I should have quit while I was ahead.

23 MR. MARTIN: You always ask one question too many.

24 MR. BENEFIEL: Well, it will come out sooner or
25 later.

26 BY MR. BENEFIEL:

27 Q. There was -- you submitted a declaration -- do
28 you recall there was a big issue made about extruded

1 plastic, that it had to be extruded in the patent?

2 A. It had to be extruded into sheet form, okay?

3 Q. Was the Exhibit 1 extruded, as far as you know?

4 A. Yes.

5 Q. There were some statements made that you
6 couldn't find proper plastic at least in extruded form in
7 the course of your research?

8 A. That's right.

9 Q. Except from Witt?

10 A. That's right.

11 Q. As far as the coverage of the patent, you
12 don't -- from what you've testified to before about patent
13 matters, do you think you could tell when something
14 infringes on your patent or not from the look of it?

15 A. Yeah.

16 Q. How could you tell?

17 A. Well, if it's a flexible cutting board, like we
18 have, then right away a red flag is going to go up for me,
19 okay?

20 Then the next thing is, if it is -- if it's not
21 an infringement on my patent, it's going to be -- probably
22 not going to fall into the parameters that we need to make
23 it work.

24 I can't look at it and say -- I can't look at
25 something and say "Well, that hardness and this and that and
26 this and that."

27 The only thing I can do is look at the general
28 operation of it and then a red flag goes up and then from

1 then on, it's out of my hands.

2 (Exhibit 19 was marked for identification.)

3 BY MR. BENEFIEL:

4 Q. Okay. I'll show you one last sample that we've
5 put the identification Exhibit 19 on.

6 A. Okay.

7 Q. Would you consider that pretty much according
8 to your invention?

9 MR. MARTIN: I can answer the question that a red
10 flag would go up.

11 THE WITNESS: But no, what's your question again?
12 Would I consider what?

13 MR. BENEFIEL: Let the record reflect it's red.

14 THE WITNESS: Sure, sure I would. It feels
15 different.

16 BY MR. BENEFIEL:

17 Q. What about -- I'll show you a UK patent, if
18 you'll look at the illustration there. Do you think you
19 would consider that an infringement?

20 A. I believe this is a lot thicker, isn't it? I
21 mean, if you're talking about just the fact that they've got
22 it in that position, the red flag goes up. But other than
23 that, I can't tell from this anything else.

24 I mean, he could have a great big thick piece
25 of material that they're barely able to bend like that and
26 holding it for the picture,

27 (Exhibit 20 was marked for identification.)

28 ////

1 BY MR. BENEFIEL:

2 Q. Well, the text talks about polypropylene in a
3 range of millimeters. I think it goes from 8/10ths to two
4 millimeters. That would be around 20 thousandths, would it?
5 32 thousandths to 80 thousandths.

6 I guess from the numbers you wouldn't really
7 take a position --

8 A. Not from what you just said to me. 80
9 thousandths, 30 thousandths of -- what are we talking,
10 millimeters here?

11 Q. Polypropylene.

12 A. You're saying their patent goes from 30
13 millimeters.

14 Q. 38 millimeters to .2 --

15 A. 38 is a little under this. This is .010 right
16 there.

17 Q. .8, it's around 40 thousandths for one
18 millimeter.

19 A. You're saying .8, not .08. Okay. That would
20 be the equivalent to about eight of these put together.

21 Q. Or maybe something like Exhibit 13?

22 Getting close to the end here. I think I'm
23 just about through.

24 Yeah, that's all the question I have, yes.
25 That's all the questions I have.

26 MR. MARTIN: I don't have any questions on cross.

27 THE WITNESS: Can I ask questions?

28 MR. SCHWARTZ: No.

1 MR. BENEFIEL: Do you want to review it and sign it,
2 the original would come back to me after he signs it then.
3 I don't think we file it with the court down here.

4 MR. MARTIN: I'd like to have possession of the
5 original briefly because of the exhibits and then I could
6 return it to counsel for safekeeping. If that would be
7 acceptable.

8 THE REPORTER: Who do I send it to?

9 MR. SCHWARTZ: It will go to Mr. Martin and then
10 passed on to Mr. Thompson for review.

11 THE REPORTER: Is the court reporter relieved of her
12 duties under the code?

13 MR. BENEFIEL: Yeah.

14
15 (Whereupon, at 12:00 noon, the deposition was concluded.)
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28

1 I hereby declare under penalty of perjury that the
2 foregoing is my deposition under oath; that these are the
3 questions asked of me and my answers thereto; that I have
4 read my deposition and have made the necessary corrections,
5 additions or changes to my answers that I deem necessary.

6 In witness thereof, I hereby subscribe my name,
7 this _____ day of _____, 1997.
8
9
10
11

12 _____
13 RODERICK THOMPSON
14
15
16
17
18
19
20
21
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23
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28

1 STATE OF CALIFORNIA)

2 :

3 COUNTY OF SAN DIEGO)

4
5 I, Kathleen A. Powell, CSR No. 2778, hereby certify
6 that I reported in shorthand the above proceedings on
7 Friday, April 11, 1997, at 750 B Street, Suite 2100, in the
8 City of San Diego, County of San Diego, State of California;
9 and I do further certify that the above and foregoing pages,
10 numbered from 5 to 64, inclusive, contain a true and correct
11 transcript of all said proceedings.

12 It was stipulated that the original deposition be
13 delivered to Mr. Martin, for the purpose of having the
14 witness read, correct and sign his deposition under penalty
15 of perjury; said original thereafter to be maintained by Mr.
16 Benefiel until the time of trial.

17 DATED: April 14, 1997

18
19
20
21 

22 KATHLEEN A. POWELL

23 CSR NO. 2778